

Equal Employment Law in the Twenty-First Century

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INTRODUCTION

After agreeing to write this essay on the future of equal employment opportunity law in the twenty-first century, I was at a loss how to begin. In fact, I regretted consenting to such an endeavor. I toyed with clever and not so clever ideas for an opening paragraph, only to discover that more than twenty years ago, Professor Brainerd Currie had virtually preempted that approach in an article he wrote for a symposium on the future of law. Professor Currie began his article saying: "No man ever leaped clear-eyed from his bed, crying 'Go to! I will write a paper on the future of legal education,' and proceeded to do so forthwith."¹

Perhaps part of the problem is attempting to write about the future, but Professor Currie did find a way to write his article. For me, the unifying idea for this essay on the future of equal employment opportunity law came when the United States Supreme Court issued its decision in *Regents of the University of California v. Bakke*.² I realize that the long-awaited *Bakke*, the so-called "reverse discrimination" case, came almost exactly thirty-seven years after the event I consider the real beginning of equal employment law: President Roosevelt's issuance of Executive Order Number 8802.³ The first executive order prohibiting job discrimination and the *Bakke* decision, although the latter is an education case testing the modern concept of affirmative action, are the first and latest steps in the development of equal employment law. The first is a recognition of the problem; the second involves the conflict in attempting to resolve it.

Executive Order Number 8802 and the *Bakke* case do two things: they recognize the problems of discrimination and define the historical parameters of equal employment law. Both are important events, and it is important to introduce the reader to them.

It was on June 25, 1941 that President Roosevelt reluctantly issued Executive Order Number 8802. A. Philip Randolph, the president of the predominantly black Brotherhood of Sleeping Car Porters, had threatened a march of 10,000 people on Washington to protest job discrimina-

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1. Currie, *Law and the Future: Legal Education*, 51 NW. L. REV. 258, 258 (1956-1957).

2. 98 S. Ct. 2733 (1978).

3. Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.) (1941).

tion in the defense industries, and he later raised the number to 100,000.⁴ Roosevelt feared the possible international reaction to such a demonstration. When he was unable to dissuade Randolph from demonstrating, Roosevelt issued Executive Order Number 8802. It prohibited job discrimination on the basis of race, creed, color, religion, and national origin in the defense industries, and it established the Fair Employment Practices Committee (FEPC) to carry out the purposes of the order.⁵

The order was significant despite its limitations. The President's Fair Employment Practices Committee had no enforcement power and almost no staff; it necessarily relied on publicity and moral suasion. Furthermore, the order was based on risky constitutional authority and faced congressional hostility. Even so, the prohibition of job discrimination spawned hope in millions of black Americans for a national fair employment law that would usher in a new millenium.⁶

Executive Order Number 8802 was a brave beginning.⁷ Although its only lasting significance may have been the use of Presidential power to address discrimination, virtually all of the law worthy of the label "equal opportunity law" has been created since 1941.⁸ Progress from that beginning has not been easy, and the federal equal employment laws and orders that followed the first executive order were not given a firm statutory base until the passage of the Civil Rights Act in 1964.⁹ Moreover, despite numerous opportunities,¹⁰ the Supreme Court has yet to rule squarely on the role of affirmative action relief in employment cases.

The latest step in the development of equal employment law occurred on June 28, 1978, when the Supreme Court issued its decision in *Regents of the University of California v. Bakke*.¹¹ The case concerned the right to be admitted to a state medical school. The school had a special admissions program that considered the disadvantaged status of minority students

4. D. LOCKARD, TOWARD EQUAL OPPORTUNITY 17 (1968).

5. For discussions of fair employment practice committees, see M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 9-17, 103-142 (1966). See also P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT 149-79 (1964); L. KESSELMAN, THE SOCIAL POLITICS OF FEPC (1948).

6. *Id.*

7. A brave beginning had also been made between 1863 and 1871 with the Emancipation Proclamation and the antebellum civil rights laws, presently codified at 42 U.S.C. 1981 & 1983 (1970). However, by 1875 virtually all of those earlier laws had been eviscerated by interpretations of the Supreme Court.

8. See Jones, *The Transformation of Fair Employment Practices Policies*, in FEDERAL POLICIES AND WORKER STATUS SINCE THE THIRTIES 159 (1976).

9. 42 U.S.C. §§ 2000e-2000h (1970).

10. *Rios v. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *NAACP v. Allen*, 493 F.2d 614, 617-19 (5th Cir. 1974); *United States v. Local 212, Int'l Bhd. of Elec. Workers*, 472 F.2d 634, 635-36 (6th Cir. 1973); *Carter v. Gallagher*, 452 F.2d 315, 327-28 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). The Supreme Court has recently agreed to hear a case dealing with the role of affirmative action relief in employment cases. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977), *rehearing denied*, 571 F.2d 337 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3401 (U.S. December 11, 1978).

11. 98 S. Ct. 2733 (1978).

and reserved sixteen places out of a class of one hundred for them. Mr. Bakke charged reverse discrimination when he was not admitted under the regular admissions program for white applicants.¹²

Bakke was to be a landmark decision. Although the case was in the field of medical education, most observers anticipated that the decision would have significance for employment law and other fields where affirmative action was an issue. Announcement of the *Bakke* opinion was marked by enormous public interest and media exposure, but after the fanfare had quieted and the decision was read, it was clear only that Bakke had prevailed; he had been ordered admitted to medical school. The decision left most of the critical issues for a later day. The most critical issue in the case was the future of any affirmative action, whether based upon a judicial determination or upon administrative or legislative initiatives. Contentions regarding the choice of constitutional doctrine to support or reject affirmative action, as well as conditions and limitations upon the use of the concept, saturated the briefs for and against Bakke. If Bakke was to prevail, what, if anything, could be done to deal with the realities of underutilization of minorities in our social and economic endeavors? How are minorities to move into the positions from which they have been excluded? How do we balance minority and majority rights? In retrospect, it was unrealistic to have expected the *Bakke* decision to answer these questions. But the future demands that they be answered.

The answers we give will determine the future of equal employment opportunity law. But before turning to look ahead, a brief sketch of the years between Executive Order Number 8802 and the *Bakke* decision seems appropriate, for those years form the basis for what prophecies can be made.

I. EQUAL EMPLOYMENT OPPORTUNITY LAW— THE EARLY YEARS: 1941-1961

There is not room to recount the social, economic, and historic events that shaped this country from 1941 through 1961 in an essay of this magnitude. Suffice it to say that the span was marked by great national and international turmoil. Those years included a major war and a so-called police action, the formation of the United Nations and near continuous political, social, and economic conflict. It was also the beginning of "Negro revolt" on the domestic front.¹³

It seems reasonable to conclude that the political and social dynamics of this period contributed to the emergence of equal employment opportunity law. The first strains of equal employment law were the Presidential

12. *Id.* at 2741-42.

13. L. LOMAX, *THE NEGRO REVOLT* (1962).

prohibition of discrimination, the development of concepts of what constituted unlawful employment discrimination, and the application of the constitutional concepts of equal protection and state action to discriminatory acts.

President Roosevelt's issuance of Executive Order Number 8802 was a creative effort to grapple with employment discrimination. The President's executive order rested on three sources of potential legal and constitutional authority: (1) the power of the President during wartime as commander in chief; (2) the obligation the President has as chief executive to take care that the laws and the Constitution are faithfully executed; and (3) the procurement power of the government. The third suggested source of Presidential authority had arguable support in the Supreme Court's decision in *Perkins v. Lukens Steel Co.*, a case that concerned contract terms under the Public Contracts Act of 1936.¹⁴ *Perkins v. Lukens* asserted that the government, like any other contractor, was entitled to impose the terms and conditions under which it was going to do business. Some might consider this a rather extravagant assertion. In fact, none of the three sources of legal and constitutional authority had been so clearly litigated in 1941 as to be a strong base for the revolutionary proposition that the President, acting for the federal government, could prohibit employment discrimination in private employment.

The legal concepts of unlawful discrimination used during this time were less novel and less far reaching. Two major theories were used. The first required a deliberate, intentional act to injure an individual because of that individual's membership in a race or other group, by conduct that was tortious and malicious, perhaps criminal. The second concept utilized constitutional notions of fourteenth amendment equal protection. The deliberate, intentional unequal treatment of a person because of his or her membership in a race or religion was frowned upon under the law. The difficulty with either concept was that its reach was limited to official "state conduct"; it did not cover private discrimination.

It should be pointed out that these definitions of discrimination as injury or unequal treatment of the individual were also carried over to the President's executive order. The order provided for investigation of individual complaints, and redress or remedy to reach intentional, malicious, and unequal treatment as "wrongs" under the executive order.

Racially discriminatory treatment accorded minority employees by a labor union was proscribed by the developing duty of fair representation. The doctrine was first enunciated by the Supreme Court in *Steele v. Louisville & Nashville Railroad Co.*¹⁵ In that case, the Court required a railroad union "to represent non-union or minority union members of the

14. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Public Contracts Act of June 30, 1936, Pub. L. No. 74-846, 49 Stat. 2036 (1936).

15. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

craft without hostile discrimination, fairly, impartially, and in good faith."¹⁶ Although the duty of fair representation rests on a constitutional-governmental action concept, the Court found it unnecessary to reach the constitutional proposition. The Court determined that under the governing statutes,¹⁷ invidious discrimination was not permitted. The indirect method of reaching that conclusion was that the union and the employer operated under the law and owed their power and position to the law; attached to the privilege and power granted by the law were implied governmental constraints upon invidious discrimination.

Most civil rights law during this time was clearly based on an idea of constitutional-governmental action; advocates attempted to reach private discriminatory conduct by establishing the facts of governmental action. This required changes in the concepts of discrimination and governmental action. The infamous "separate but equal" proposition of *Plessy v. Ferguson*¹⁸ was an application of constitutional concepts to challenged governmental action. It was not until the celebrated school desegregation cases of *Brown v. Board of Education*¹⁹ and *Bolling v. Sharpe*²⁰ that the Court determined that separate was inherently unequal. Furthermore, it was in 1961, in *Burton v. Wilmington Parking Authority*,²¹ that the Supreme Court started to unravel the fact situations in which a government agency is so entwined with private discrimination that private discrimination becomes state action, subject to constitutional scrutiny.

As a final note for this period, it should be mentioned that during the 1940s various states enacted fair employment practice laws that banned private discrimination. When the laws were challenged, the Supreme Court found such action to be within state authority; the state laws prohibiting discrimination did not unconstitutionally infringe upon private conduct.²²

II. SMALL STEPS—GIANT LEAPS: 1961-1971

Although attempts to get at private discrimination by establishing governmental action continued, two new concepts emerged during the next ten years that were significant additions to the battle against employment discrimination. Unlike earlier theories of unlawful discrimination that necessitated a showing of intentional and malicious discrimination, these concepts were not solely concerned with discriminatory motive. The first is the modern concept of affirmative action. The second emphasized

16. *Id.* at 204.

17. Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1970).

18. 163 U.S. 537 (1896).

19. 347 U.S. 483 (1954).

20. 347 U.S. 497 (1954).

21. 365 U.S. 715 (1961).

22. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945). See also D. LOCKARD, *supra* note 4, at 19-23.

the consequences of employment practices, as opposed to the intent with which they were undertaken.

The concept of affirmative action began with Executive Order Number 10925 issued by President Kennedy.²³ The order required that recipients of government contracts take affirmative action to ensure equality of employment opportunity, without regard to questions of guilt or specific entitlement to relief. Like most great innovations, it was a simple proposition. Like most successful innovations in the area of social behavior, it was an evolutionary step; its legal underpinnings were rooted deep in the history of Anglo-American law.

The basic concept of affirmative action comes from equity. It is no more than a fundamental fairness proposition—the court should have the tools necessary to grant complete make-whole relief. The concept is old and comfortable in Anglo-American law. Much of our social legislation grants the court or agency broad authority to remedy any injury found to have occurred by such affirmative action as may be necessary to carry out the purposes of the law.

A basis existed for the utilization of affirmative action relief in the equal employment arena. Richard Nixon, as Vice President, had chaired an Eisenhower Committee on Government Contracts. In his final report, Nixon asserted that the problems facing America were not generated by vicious people intentionally discriminating on the basis of race, but rather by the failure of employers to take positive action to eradicate the legacy of the past.²⁴ A moment's reflection upon that conclusion suggests the necessary remedy—a program divorced from concepts of guilt or injury, but addressed to the general historic condition. In retrospect, President Kennedy's affirmative action initiative appears to be a natural response to the condition recognized by the Nixon committee.

The second equal employment development of this period, which placed emphasis upon the effects of employment practices as indicia of discrimination, came after the enactment of the Civil Rights Act of 1964 and a Supreme Court decision concerning the Act. The importance of the Act was not appreciated until the Supreme Court decided *Griggs v. Duke Power Co.*²⁵ With that decision, it became clear that Congress had not only established a statutory base for a national equal employment law but had also approached the problem of job discrimination with a reasonably new concept—whether the *effects* of employment practices were discriminatory.

Griggs v. Duke Power dealt with the use of written tests and a high school education requirement for job entry and mobility. Blacks failed

23. Exec. Order No. 10925, §§ 301-314, 3 C.F.R. 448 (1959-63 Comp.) (1961).

24. See PATTERN FOR PROGRESS, FINAL REPORT TO PRESIDENT EISENHOWER FROM THE COMMITTEE ON GOVERNMENT CONTRACTS (1960). See also P. NORGREN & S. HILL, *supra* note 5.

25. 401 U.S. 424 (1971).

the test at a significantly higher rate than whites and fewer blacks had high school diplomas. The Court concluded that tests with such a disparate impact could not be used unless they had a manifest relationship to ability to do the job. In making the decision, the Court declared that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."²⁶ Thus, an important "effects test" concept of discrimination was added to the field of equal employment.²⁷

An attempt to discuss the many employment cases decided under Title VII of the Civil Rights Act would overburden this essay.²⁸ Most of the Court's decisions apply existing principles to facts under the new law rather than introduce conceptual novelties, as in *Duke Power*. One further Supreme Court decision is worthy of comment. In *Jones v. Alfred H. Mayer Co.*,²⁹ the Court resuscitated the long dormant section 1 of the Civil Rights Act of 1866,³⁰ now codified in sections 1981 and 1982 of Title 42 of the United States Code. The Court held that section 1982 barred private, as well as public, racial discrimination in the sale or rental of property. The Court found that section 1982 was enacted pursuant to congressional authority under the thirteenth amendment to eradicate "badges" of slavery, whether imposed by private or state action. After *Jones*, it seemed certain that the section 1981 ban on racial discrimination in the making and enforcement of contracts would be extended to proscribe private discriminatory action in the employment contract area, and the Supreme Court has confirmed that view.³¹ Thus, the Court in *Jones* did not invoke a new concept of discrimination, but its reappraisal of existing theory and clarification of constitutional authority and congressional intent provided an additional means of prohibiting employment discrimination.

Employment discrimination was also being fought by state and federal governments during this time. The efforts of the federal government in this area, the fruits of which were to be challenged in the *Bakke* case as reverse discrimination, began in the construction industry. Construction employer associations and unions unsuccessfully challenged the

26. *Id.* at 432.

27. See Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

Two years later in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court reemphasized its effects-test concept and added a determination of the order and allocations of proof applicable to private nonclass action suits of employment discrimination. Significantly, the Court cited an article by Alfred W. Blumrosen in the case, *Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972). In his article, Professor Blumrosen had discussed the implications of the *Duke Power* case and the effects test. The Court's favorable citation to the Blumrosen analysis verified the perception that a new concept of employment discrimination had been added by the 1964 federal statute as it was interpreted by the Court.

28. See Jones, *The Development of the Law Under Title VII Since 1965: Implications of the Law*, 30 RUTGERS L. REV. 1 (1976).

29. 392 U.S. 409 (1968).

30. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

31. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975).

government's efforts to impose goals or quotas to ensure minority participation in federally-assisted construction projects. The most notable case was *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,³² primarily because it was the first in a string of cases that supported the government's efforts.³³

Although the construction industry provides a modest number of jobs, efforts to secure employment for blacks in that industry spurred the further implementation of affirmative action programs. The government's success in litigating these cases made it possible to apply the concepts developed in construction, notably affirmative action plans, to a wide range of employers doing business with the government.

III. THE PERIOD OF TESTING AND CLARIFICATION— LIMITATION OF THE NEW EQUAL EMPLOYMENT CONCEPTS: 1971-1978

It is inevitable that when new courses are charted there is a period of adjustment. Adjustment may not be the appropriate word, but since our legal process rests on specific facts fitted to a general rule, once a new rule has been set forth, new arguments are made to test its metes and bounds. During the short period following the emergence of affirmative action programs and the consequences or effects tests, most of the Court's contributions have consisted of drawing lines of limitation or clarification.

The clarifications and limitations of equal employment opportunity law under Title VII can be seen in two major cases—*Washington v. Davis*³⁴ and *International Brotherhood of Teamsters v. United States*.³⁵ The brave new pronouncements of *Duke Power* were limited by the Supreme Court's decision in *Washington v. Davis*. In that case the Court made it clear that the "effects test" did not apply to cases brought under the Constitution. It was still necessary to prove discriminatory purpose or intent in constitutional cases. The Court also seemed to take a less demanding stance in assessing whether an employment test that excluded a

32. 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

33. See *Associated General Contractors of Mass., Inc. v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970). See *Rios v. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), for a discussion of further references. For law review treatment, see Jones, *The Bugaboo of Employment Quotas*, 1970 Wis. L. Rev. 341 (1970); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Comment, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J. LAW & SOC. PROB. 187 (1970); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972); Note, *The Legality of the "Revised Philadelphia Plan"*, 30 MD. L. REV. 114 (1970).

34. 426 U.S. 229 (1976).

35. 431 U.S. 324 (1977).

disproportionate number of minority applicants was sufficiently job related to be deemed valid under Title VII.³⁶

The Supreme Court's determination in *International Brotherhood of Teamsters v. United States*³⁷ imposed a more surprising limitation. The Court held that Congress did not intend the standards enunciated in *Duke Power*³⁸ to apply to otherwise bona fide seniority programs. The Court concluded that Congress had granted a measure of immunity to seniority systems in Title VII of the Civil Rights Act of 1964. Therefore, the effects test, which would otherwise make the neutral consequences of the seniority systems illegal discrimination, was not to be applied.

Washington v. Davis and *International Brotherhood of Teamsters v. United States* appear to have limited the scope of the effects test and interpretation of Title VII law. There was, however, an additional element in *Washington v. Davis* that appeared hopeful. In that case the Supreme Court asserted that any inference of intent to discriminate by the District of Columbia was more than met by the successful operation of the District's race specific affirmative action program. This assertion seemed to contain the seeds of ultimate approval for affirmative action programs.

The preceding two cases set in place major Title VII developments, but when Congress changed the law in 1972, there were new issues to be litigated. Congress extended the coverage of Title VII, making it applicable to both state and local entities. The new law also provided statutory guarantees for federal employees.

The most significant issue to be litigated as a result of these changes may have been the right of individuals to sue the states, despite the strictures of the eleventh amendment on the jurisdiction of federal courts to hear citizen complaints. In *Fitzpatrick v. Bitzer*³⁹ the Supreme Court held that an individual subjected to employment discrimination by a state could sue that state in federal court, pursuant to an express statutory authorization in the Civil Rights Act, which was held to be constitutional. The Court declared that to the extent the eleventh amendment was a bar, it had been repealed *pro tanto* by the subsequently enacted fourteenth amendment; the fourteenth amendment clearly provided a basis on which Congress could enact legislation granting federal court jurisdiction of actions by citizens against their own state or by citizens against another state.

Another development in employment discrimination law was the Supreme Court's holding in *McDonald v. Santa Fe Trail Transportation Co.*⁴⁰ The Court decided that Title VII and section 1981 applied to discrimination against whites as well as against blacks.

36. *Washington v. Davis*, 426 U.S. 229, 248-52 (1976).

37. 431 U.S. 324 (1977).

38. 401 U.S. 424 (1971). See also *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977).

39. 427 U.S. 445 (1976).

40. 427 U.S. 273 (1976).

Most of the history of equal opportunity law has been discussed in terms of racial discrimination because racial discrimination has been and remains a major problem in American society. But it is also important to remember other types of employment discrimination. The two I will touch upon here are sex and religious discrimination.⁴¹

The Supreme Court has found discrimination on the basis of sex to be violative of the equal protection clause of the fourteenth amendment and due process requirements of the fifth amendment.⁴² In deciding those cases, the Court has developed a selective way of viewing laws that classify on the basis of sex. The Court appears to use a sliding concept of scrutiny—the Court will sustain laws that it views as compensating for historical deprivation; it will strike down laws that maintain sex stereotypes to the disadvantage of women.

The Supreme Court's selective use of existing judicial rules and concepts to deal with sex discrimination under the Constitution has not been wholly satisfactory. Classifications based upon sex have not been subjected to "strict scrutiny" analysis under the equal protection clause,⁴³ as is the case with classifications based upon race. Feminists' continued efforts to secure an equal rights amendment reveal substantial unhappiness with the Court's treatment of sex.

But sex discrimination claims have fared better under the Constitution than under Title VII. In *General Electric Co. v. Gilbert*,⁴⁴ the Court concluded that Congress did not intend to make the exclusion of pregnancy disability from an employee disability plan a violation of Title VII. If the Court had stopped with that rationale, the opinion would have been understandable. The Court, however, attempted to convince the reader that exclusion of pregnancy from an otherwise comprehensive disability plan was not gender-based discrimination. The argument that pregnancy was not sex based brought howls of protest and hoots of derision. The Court has subsequently modified its position. It has asserted that Title VII did not permit women to be burdened by maternity plans that deny them their accumulated seniority after a pregnancy leave of absence, although it did not require that they be benefited with sick pay during that leave.⁴⁵ The 1978 amendments to the Civil Rights Act of 1964 have gone even further, making it unlawful for any employer to

41. This paper will not deal in detail with the development of equal employment rights for handicapped persons, but the hope is that the law in this important area will move beyond attitudes of condescending sympathy to an understanding of the abilities of handicapped persons and the full utilization of their skills. Some strides have been taken toward this goal. See, e.g., The Vocational Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. III 1973).

42. *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). See also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Forbush v. Wallace*, 405 U.S. 970 (1972).

43. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

44. 429 U.S. 125 (1976).

45. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

discriminate on the basis of pregnancy in the formulation and administration of fringe benefit programs.⁴⁶ In *City of Los Angeles, Department of Water and Power v. Manhart*,⁴⁷ the Court decided that a retirement plan that required women to contribute more than men because of their longer life expectancy was sex-based discrimination in violation of Title VII.

The area of religious discrimination under Title VII, as well as under local law, is becoming increasingly complex. Because of first amendment protections and the separation of church and state, religion stands on a somewhat different footing than other invidious discrimination. The conflicting interests in this area may all be constitutionally legitimate. At this time, it seems apparent that the duty of the employer to accommodate different religious beliefs is less demanding than the duty to redress alleged race or sex discrimination, and the concepts concerning religious discrimination are relatively less developed.⁴⁸

It should be noted in concluding this discussion of the years 1971-1978 that new classes have been extended protection under employment laws. The handicapped and Vietnam era veterans are protected by special statutes.⁴⁹ Some local jurisdictions prohibit discrimination on the basis of sexual preference. Congress has increasingly resorted to affirmative action requirements in other statutes, and state and local governments have followed suit with executive orders, statutes, and ordinances.

IV. AFFIRMATIVE ACTION—THE FUTURE ON TRIAL: THE *Bakke* ERA

With a brief history in place, it is time to look at the latest step in the development of equal employment law: questioning the validity of affirmative action. During the five years between the Supreme Court's consideration of *DeFunis v. Odegaard*⁵⁰ and *Regents of the University of California v. Bakke*,⁵¹ the country had agonized over the desirability and constitutionality of affirmative action as an instrument of social change.

One view of affirmative action is that it should be called reverse discrimination. "Affirmative action" is a device to penalize the innocent and to reward the unfortunate; it is a violation of our concepts of individual merit and equal protection. This view is based upon the belief that the past is past. We start afresh with the Civil Rights Act of 1964 and all persons are equal.

46. Act of October 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (to be codified at 42 U.S.C. 2000e).

47. 435 U.S. 702 (1978).

48. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

49. See The Vocational Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. III 1973); Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. § 2012 (Supp. IV 1974).

50. 416 U.S. 312 (1974).

51. 98 S. Ct. 2733 (1978).

The alternative view of affirmative action is that we cannot start afresh until the racial distortions that pervade our society have been removed. Discrimination that has existed for over two centuries cannot be eradicated by denying its existence. To eliminate racism, there must be positive programs to remedy the present effects of past practices. In this view, affirmative action is seen as a last ditch effort to deal with the historical legacy of racial discrimination. It is a moral responsibility for our society as a whole.

In dealing with societal racism, the issue of the constitutionality of affirmative action is as significant as was the issue of separate but equal. *Bakke* may not be a landmark case of the caliber of *Brown v. Board of Education*,⁵² but the case is worth discussing in detail, both for what it said and how it can be understood in the context of past pronouncements by the Court.

The concept of affirmative action programs, as opposed to court-ordered remedies, was a novel one in *Bakke*. Five Justices agreed that properly designed affirmative action programs that are race conscious do not violate the Constitution or the statute. Four Justices declined to decide the constitutional issue. They believed that the legislative history of the Civil Rights Act of 1964 manifested the intent of Congress to be color blind in the dispersal of federally financed benefits. Therefore, they concluded that the affirmative action program in *Bakke* violated Title VI of the Act.

It is important to understand *Bakke* in the context of past cases that strengthen the arguments for the constitutionality of affirmative action. There are significant cases that raised similar constitutional issues and in which all the Justices indicated a favorable view of affirmative action, including the use of numerical quotas.

In *Washington v. Davis*,⁵³ Justices Stewart, Rehnquist and Burger joined in a majority opinion by Justice White that seemed to accent the legitimacy of a race specific program. The opinion stated:

Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court *correctly held* that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."⁵⁴

The District Court had litigated a number of issues concerning the

52. 349 U.S. 294 (1954).

53. 426 U.S. 229 (1976).

54. *Id.* at 246 (emphasis added). The district court had determined a number of issues concerning the affirmative action program. Among those issues were questions about the appropriate labor market for the District of Columbia and the appropriate population to govern the affirmative action effort.

affirmative action program. Among those issues were the appropriate labor market area for the District of Columbia and the appropriate population to govern the affirmative action effort.

*United Jewish Organizations of Williamsburgh, Inc. v. Carey*⁵⁵ concerned redistricting senate and assembly seats. The Court declared that neither the fourteenth nor the fifteenth amendment mandates any per se rule against using racial criteria in districting and apportionment. Furthermore, the permissible use of racial criteria in redistricting was not confined to remedying the effects of past discriminatory apportionment or districting. Justice White wrote the opinion and he was joined by Justice Stevens. Justice Rehnquist joined in part. All recognized that racial criteria may be used without violating the Constitution and that in the voting area some numerical proportionality may be used. Even Justice Burger, the only dissenter, recognized that reference to the racial composition of a political unit may, under certain circumstances, serve as "a starting point in the process of shaping a remedy."⁵⁶

Taken together, the two cases suggest that the four Justices who ruled in favor of Bakke on statutory grounds would go at least as far as Justice Powell did in regard to affirmative action programs. Justice Powell indicated that he was prepared to accept a system that took race into account as a factor in selection and perhaps even numerical goals where there had been an administrative or legislative determination of prior illegal discrimination.⁵⁷

V. THE FUTURE OF EQUAL EMPLOYMENT OPPORTUNITY LAW

The *Bakke* decision, placed in the context of other Supreme Court cases and within the historical flow of equal employment law, provides a basis for future projections. At the outset, it appears that administrative or legislative employment programs will be able to use race and numerical goals. If the goals are not structured to penalize nonminorities, they should be able to withstand constitutional challenge. To the extent that constitutional blessings are given to appropriate affirmative action programs, the future of equal employment will depend less upon the attitude of the judiciary and more upon the political will of the country.

The political will of the country to achieve a "purified republic"—a country free of the corruption of discrimination—will determine how quickly changes are made. In a little book that appeared in 1967, the late Professor Arthur Ross wrote a chapter entitled, "The Negro in the American Economy."⁵⁸ Professor Ross predicted that if the rate of

55. 430 U.S. 144 (1977).

56. *Id.* at 185. Burger is citing his own opinion in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

57. *Regents of the Univ. of Cal. v. Bakke*, 98 S. Ct. 2733, 2753-56 (1978).

58. Henderson, *Regions, Race, and Jobs*, in *EMPLOYMENT, RACE AND POVERTY* 76 (A. Ross & H.

change of 1964 could be maintained, blacks would be fully integrated into the occupational structure by the year 2000. That prediction now seems too optimistic. It seems that integration has slowed, and we have been plagued by unemployment. If, however, the problems in employment unrelated to race could be solved, full occupational integration by the year 2025 does not seem unrealistic.

How racial integration in the work force is to take place will depend upon the employment opportunities available. If there were continuous full employment, the layoff problem of "last hired, first fired" that has afflicted minority employment would disappear. Assuming equitable distribution of minorities in the workforce, there would be occupational integration. It is likely, however, that employment patterns of the twentieth century will continue into the twenty-first. If there would be periods of high employment offset by periods of high unemployment, affirmative action programs would be necessary to overcome the problems newer workers face in layoff situations.

Although there has not been a critical test of affirmative action in employment before the Supreme Court, the law does not appear to stand in the way of such programs. Looking both at the legislative history of Title VII of the Civil Rights Act and the executive order programs, it seems reasonable to conclude that Congress intended the programs to work in tandem. Under this analysis, affirmative action programs would not offend the statute, and under *Bakke* it also appears that they would not offend the Constitution.

The proceeding discussion assumes an optimistic, if not entirely cloudless, future and an end to employment discrimination. That is not the only future that can be imagined. If the lack of clarity in the *Bakke* decision contributes to a chilling of affirmative action programs and if black youth remain disproportionately unemployed, there will be black revolt again. It is too easy to forget the anger and violence of the sixties. The revolutionary fervor of the Black Panthers fades from memory as their leaders run for political office and work in social programs for the public at large. It is too easy to forget what happens when people have no place and no chance in our society.

The tragedy is that an outbreak of anger would take forms infinitely worse than the marches and burnings of the sixties. There are now effective models for the use of terror as an instrument of social and political change. It is not unrealistic to fear black counterparts of a Red Brigade in American streets. The outcome would be repression, terrible for blacks and destructive to the integrity of our society as a whole.

It is a risk we need not run. A clear validation by the Supreme Court of affirmative action programs would preserve the most vital new tool to

emerge from the twentieth century with which to attack discrimination in the twenty-first.

The integration of minorities into the work force is a necessary change; it seems certain there will be other changes in employment patterns. The two that will be briefly discussed here concern the employment of older Americans and women.

It can be predicted that the work force of the future will contain many older Americans, and there will be changes in societal values and laws to accommodate them. By the year 2000, fifty percent of the population is expected to be over forty.⁵⁹ There will be a dramatic increase in people over sixty-five and a dramatic decrease in persons under twenty-five.⁶⁰ It does not appear that there will be enough young workers to support older workers at the present ages of retirement.⁶¹ The prediction for an older work force seems almost self-evident.

Social values and policies concerning age will have to be changed. One needed change will be the removal of mandatory retirement and that will require statutory changes and changes in constitutional interpretation. The Age Discrimination in Employment Act,⁶² passed in 1967 to promote the employment of older people, only covered workers to age sixty-five until it was recently amended to expand coverage to age 70. In *Massachusetts Board of Retirement v. Murgia*⁶³ the Supreme Court held that the compulsory retirement of police officers at age fifty did not violate the equal protection clause of the fourteenth amendment. The Court's position on age discrimination was that it did not warrant the degree of constitutional scrutiny given to traditional invidious discrimination.

Age discrimination in employment appears to be an area in which the law will have to keep up with social change. And although these changes are unlikely to come easily, they seem essentially positive—society's need for self-supporting older workers will stimulate utilization of the wisdom and experience that has been ignored and wasted.

The role of women in the work force can also be expected to expand, not only in terms of numbers of women working but in the level of jobs they hold. Increasingly, both married and single women are working through the family cycle and restrictions upon their work force participation opportunities will be less well tolerated.⁶⁴ The Equal Pay Act of

59. Drucker & Moore, *Mandatory Retirement: Past, Present and Future of an Anachronism*, 5 W. ST. L. REV. 1 (1977).

60. *Id.*

61. HOUSE SELECT COMM. ON AGING, 95TH CONG., 1ST SESS., MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS (Comm. Print 1977)

62. 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975), as amended by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (to be codified in scattered sections of 29 U.S.C.).

63. 427 U.S. 307 (1976).

64. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 219 (1975) [hereinafter cited as B. BABCOCK].

1963⁶⁵ and the Civil Rights Act of 1964⁶⁶ require equality for women in employment, training, advancement, and pay. Coupled with higher career aspirations, the laws will provide a framework for equality in employment.

But laws against sex discrimination and high aspirations are not enough. Equitable treatment for women will also be dependent on labor market trends and awareness among women of human resources demands.⁶⁷ Even if jobs exist, women will need improved career counseling and occupational training to move into jobs that have not been traditional women's work. Women also need to continue to oppose discriminatory employment practices. Since the Supreme Court's treatment of sex discrimination can most charitably be described as uneven, women must continue to challenge employment discrimination through the political process.

For the effort required, social change seems to come slowly. But there is change. In the waning days of the 1977 term, the Supreme Court held that cities are suable entities under federal law.⁶⁸ The Court has also recently concluded that officials may be held liable for their misconduct and substantially limited the immunity previously available to them.⁶⁹ Civil rights advocates can now hold cities and officials accountable for their actions, and both decisions are likely to have significance for future equal employment law.

As a final, overall prediction, it seems reasonable that equal employment law of the twenty-first century will continue to remove discriminatory barriers. However, discussing the problem of employment discrimination in terms of law is an oversimplification. Even a brief tracing of relationships affected by employment discrimination quickly becomes complicated—jobs are related to training, which is related to the quality of school, which is related to housing patterns, which are related to economic status, and so on. In short, employment discrimination is a pervasive societal problem. For a future of equal employment opportunity, social change will have to occur in a multiplicity of ways. Perhaps the most hopeful signs of change are less in the law than in the sustained efforts of minorities and women for increased participation in politics—local, state, and federal. As their organization, cooperation, and political effectiveness become increasingly apparent, the laws as well as the political priorities of government will be more responsive to their problems.

65. 29 U.S.C. § 206(d) (1970).

66. *Id.* §§ 2000e-2000h (1970).

67. B. BABCOCK, *supra* note 64, at 222.

68. *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978).

69. *Butz v. Economou*, 98 S. Ct. 2894 (1978).

There seems to be light at the end of the equal employment tunnel. Its brightness will depend upon our ability as a nation in the twenty-first century to "share the burdens of past discrimination"⁷⁰ and to move toward the "purified republic" within which our legal system can concentrate upon individual rights uncorrupted by the legacy of a sordid history.

CONCLUSION

In an attempt to rectify the effects of years of racial discrimination, the Supreme Court will, in the twenty-first century if not before, clearly affirm the constitutionality of affirmative action programs. The doctrinal inconsistencies that led the Court to use one approach to historical sex-based discrimination and another to discrimination based upon race will not survive the test of time.

Age restrictions on continued employment will be eliminated in due course. If ability to do the job is to be key, then measuring the individual in particular, and not groups of individuals in general, should and will be the appropriate standard.

Handicapped persons almost always receive our sympathetic attention. With maturity, we may even be able to move from sympathy to acceptance and understanding of them as individuals and more rapidly require the elimination of impediments to their utilization of all of their skills.

My most optimistic prediction for the future is the elimination of employment barriers based upon sex. The steady march of women in education, in determination, and in participation in all areas portends an early demise of stereotypical impediments. Choice and ability will reign supreme. We may in the twenty-first century even become mature enough to deal fairly with the issue of sexual preference.

All of these optimistic projections are heavily dependent upon the economic well-being of the nation. If jobs become scarce, sharing the burdens will become nearly impossible. People seem no more likely to be generous in hard times than three dogs are likely to share one bone. Therefore, to solve the problems of invidious job discrimination we must also address the larger economic and social issues.

70. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).